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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA,

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. HIEN MINH NGUYEN, Defendant.	Case No. CR 15-203 BLF **DEFENDANT'S REPLY BRIEF**

INTRODUCTION

The Indictment alleges, and the Government's Trial Memorandum reiterates, that from 2005 through 2011, Defendant Hien Minh Nguyen ("Hien") had sole signatory authority over the Bank of America ("BofA") account of the Vietnamese Catholic Center (VCC), also known as Trung Tam Cong Giao ("TTCG"). *See* Indictment at ¶ 4; and Government's Memorandum at p. 6. Hien is charged with taking fourteen checks made payable to either the VCC or TTCG over a 3 year period, signing them with his own signature, and depositing them into his own account at Wells Fargo Bank (WFB) rather than the VCC/TTCG account at BofA. The fourteen checks total $19,000 ranging from as small as $ 300 to high as $3,000. The Government claims Hien's actions with respect to these fourteen checks violate 18 U.S.C. § 1344(1) and (2). We disagree.

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THE STIPULATED FACTS

The underlying facts as stipulated to by the parties are as follows:

1. Hien was the director of the VCC and a signatory on its account at the BofA;

2. Hien signed 14 checks over a 3 year period totaling $19,000 which were all made payable to the VCC .The 14 checks were deposited by Hien into his account at Wells Fargo Bank ("WFB"), rather than at VCC's account at the BofA. Hien signed his own name on each check and included his own account number at WFB.

4. There were no forgeries or alterations on the check;

5. No representations of any kind were made by Hien to the tellers at WFB regarding these checks; and

7. No evidence is included in the Stipulation about any representation made by Hien to the payors of the checks.

In order to be convicted of bank fraud Hien must have done something other than to sign a check payable to VCC with his own name and deposit it into his own bank account, rather than VCC's account at the Bank of America. Hien did nothing more.[1]

ANALYSIS

The Government reaches to the Second, Eight and Tenth circuits in search of authority for its position that the stipulated facts in this case support a conviction for bank fraud. However, the limited persuasive value of these out of circuit decisions is further diminished in that each case is factually distinguishable. Moreover, there is no authority in this Circuit that supports the Government's position.[2]

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[1] Perhaps mindful of their own statutory overreaching the Government avers that – if nothing else – conviction on the bank fraud charges will allow the United States to argue at sentencing that restitution should be ordered for the victims of the bank fraud charges. *See*, United States' Trial Memorandum at p.2, Lines 10-14 To be sure, such a claim has nothing to do with the Defendant's guilt or innocence of these charges and should be ignored by this Court.

[2] The legislative history of §1344 establishes that Congress enacted the bank fraud statute to fill gaps existing in federal law over "frauds in which the victims are financial institutions that are federally created, controlled or insured." *United States v. Thomas*, 315 F.3d 190 (3rd Cir. 1990) (footnote continued)

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In *United States v. Ponec*, 163 F.3d 486, 487-489 (8th Cir. 1988), the defendant was convicted of bank fraud because he made deposits into his own account of checks made payable to the company for which he worked. Specifically, the defendant used blank deposit slips, showing his personal account number, to cause the company's checks to be deposited into his account. *Id*. at 487. In this way, the fact that the company's checks were credited to the account of the defendant, rather than credited to the company, was made less conspicuous. *Id*. The idea was that the bank tellers receiving the deposits would simply look at the deposit number and deposit the checks into the account bearing that number, not noticing that the checks were payable to the company instead of to the defendant, the account holder. *Id*. The Court found that the defendant violated the bank fraud statute based on the defendant's use of the deposit slips, not on the checks themselves, as the deposit slips represented that the defendant was dealing with the checks as he had a right to do. *Id*. at 489. Implicit in the court's holding was the critical fact that the bank could have been liable (or the victim) for the fraud, as the misrepresentation caused them to misdirect the depositing of the checks. While the Eighth Circuit recognized that the *Williams* holding was binding on them, they found that the case was distinguishable because the defendant made a false assertion, not on the check, but on the deposit slips. *Ponec*, 163 F.3d at 489.

Ponec represents a blow to our argument, but hardly a mortal one. As it is a decision of the Court of Appeals for the Eighth Circuit, it has no precedential value in this Circuit. But perhaps more important, its reasoning does violence to the central holding of *Williams* and, therefore, fatally undermines its persuasive value. This is true because *Ponec* fails to articulate a reason under *Williams* that a signature on a deposit slip is a false statement under Section 1344,

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citing S.Rep. No. 98-225 at 377 (1984), reprinted in 1984 U.S.C.C.A.N 3182, 3517. The statute's primary concern is criminalizing "fraudulent schemes where banks are victims." *Id.*, quoting H.R.Rep. No. 98-901 (1984). "The legislative history strongly suggests that the legislature wanted the intent requirements of subsection (1) to apply to any indictment under the statute, and that in order to prove bank fraud, a bank must be more than a mere incidental player." *Id.* The express legislative purpose indicates that the scope of §1344 should be limited to cases in which federally insured banks are more than incidental players, and are intentionally targeted as a victim of a fraudulent scheme or artifice. See *Id.* at 198

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while a signature on a check endorsing it for deposit is not. Hien submits that this is a distinction without a difference and this Court should decline to extend *Ponec* to the facts of this case. Indeed, the Government cites the very language from the decision that supports our argument, *viz*, "**the false assertion in the present case appeared not on the checks, but on the deposit ticket, which implicitly represented that defendant was dealing with the checks as he had a right to do.**"

Ponec's reach is further limited because, as stated *infra*, never before has this Circuit – or any court in this district for that matter – held that an indictment premised solely on the deposit of checks bearing no false endorsement into an account owned by the individual endorsing the checks for deposit is sufficient to state an offense.

The Government's reliance on *United States v. McDonald* , 209 F.App'x 748, 2006 WL 3634376 (10th Cir. 2009) is seriously misplaced. As a threshold matter, an unpublished decision from another circuit should be given no weight by this Court. In fact, the *McDonald* Order and Judgment dealt with defendant's sufficiency of the evidence challenge to her conviction after trial and raised a very specific factual scenario not at issue here—the lack of general applicability likely contributing to the 10th Circuit's decision not to publish the Order. Further, the *McDonald* court relied on its decision in *United States v. Young*, 952 F.2d 1252 (10th Cir. 1991), in order to recognize a theory of implied misrepresentation. *Young*, however, dealt with a defendant's "implied misrepresentation that she had authority to open a checking account in [her employer's] name and [defendant's] *express misrepresentation to the bank through her handwritten letter that she had authority to sign checks on the account*." *Id.* at 1255. In other words, the implied misrepresentation in *Young* did not involve the defendant's authority to deposit checks into his or her own bank account and, thus, neither Young nor McDonald are sufficient to establish a general rule that a signature on a check impliedly communicates the signer's authority to deposit the check into his personal bank account.

The Government also relies on *United States v. Morgenstern*, but that case is distinguishable too. 933 F.2d 1108 (2d Cir. 1991). In that case, Seymour Morgenstern, an accountant, took advantage of his employer's tax payment practices and manipulated the

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business's relationship with a local bank to divert funds to a different account with the same bank that was under his control:

> He did so by exploiting the Grosses' longstanding practice of using Chemical Bank as an intermediary to forward to the Internal Revenue Service (IRS) their federal payroll tax payments, e.g., withholding and social security taxes. Rather than sending payroll tax checks directly to the IRS, the sweater companies made their payroll tax checks payable to "Chemical Bank" and deposited them in an internal account at the bank known as a "payroll tax depository." The bank then forwarded the tax depository's contents to the IRS, indicating the portions attributable to the accountholders who had made deposits in it that day. Morgenstern drafted and presented to the Grosses payroll tax checks, payable to "Chemical Bank," and, after either Leo or Paul Gross had signed them, took them to the bank for deposit in the tax depository.

Id. at 1110. But Morgenstern did not deposit the Grosses tax payments into the tax depository account with Chemical Bank. Instead, he put the money into a different corporate account with Chemical bank, which he controlled but also used for legitimate payments from the Grosses for his fees. *Id.* The Second Circuit found that Morgenstern's "deceptive course of conduct toward Chemical Bank extended well beyond the silent presentation of individual checks and deposit tickets." Id. at 1113. By using a different account at the same bank, Morgenstern preyed on the Grosses banking relationship and history with Chemical bank. He also used deposited the checks at issue into an account at Chemical Bank that he used to accept legitimate fees from the Grosses. These facts are distinguishable. Hien did not deposit the checks at issue into a corporate account at WFB to take advantage of the VCC's banking relationship there and to impliedly represent his authority to negotiate the checks, which would bring this case more in line with Morgenstern. In essence, Morgenstern manipulated the banking relationship between himself, the Grosses and Chemical Bank. No such relationship exists between the VCC, Hien, and BofA, so the Morgenstern decision is neither analogous nor persuasive.

Hien Did not Knowingly Execute a Scheme to Defraud Wells Fargo Bank

Hien did not execute a scheme to defraud WFB by presenting the valid checks for deposit. "The phrase 'scheme or artifice to defraud' simply requires a design, plan, or ingenious contrivance or device to defraud." *United States v. Hill*, 197 F.3d 436, 444 (10th Cir. 1999) (finding actions of defendant was a scheme when defendant deposited a forged check into an

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account and then withdrew the funds).

In cases where courts have held that there was a scheme to defraud, the defendant had forged documents in order to be approved for a bank loan, had altered checks to defraud the bank out of funds, had deposited falsified credit card receipts, had opened accounts under false names to deposit stolen checks, had misconstrued information to obtain illegal loans from a bank; had arranged illegal nominal loan transactions; had executed a check-kiting scheme; and had tendered a check knowing he did not have the funds to cover the check amount, and then withdrew the funds from another account when it was deposited. *See United States v. McNeil, 320 F.3d 1034 (9th Cir. 2003)(opening an account under a false name and negotiating a federal income tax check payable to that name). United States v. Swanson*, 360 F.3d 1155 (10th Cir. 2004); *United States v. Hill*, 197 F.3d 436, 444 (10th Cir. 1999); *United States v. Brinsfield*, 2006 WL 620869 *3 (10th Cir. 2004); *United States v. Waldroop I.*, 431 F.3d 736, 742 (10th 2005); *United States v. Payne*, 58 Fed.App'x. 397 (10th Cir. 2003); *United States v. Jenkins*, 210 F.3d 884 (8th Cir. 2000)(the deposit of falsified credit card receipts to a federally insured financial institution); *United States v. Monostra*, 125 F.3d 183 (3d Cir. 1997)(attempting to negotiate or negotiation of forged checks); *United States v. Swanson*, 360 F.3d 1155 (10th Cir. 2004)(check kiting); *United States v. Waldroop* II, 431 F.3d 736, 741 (10th Cir. 2005) (using fraudulent information to solicit a bank loan); *United States v. Stavroulakis*, 952 F.3d 686 (2nd Cir. 1992)(sale or negotiation of stolen checks); *United States v. Young*, 952 F.2d 1252 (10th Cir. 1991)(depositing stolen checks from employer and representing to the bank that she was the signatory on account); *United States v. Laljie*, 184 F.3d 180 (2nd Cir. 1999) (physically altering checks, which alterations were apparent to naked eye, and attempting to negotiate them,); *United States v. Schwartz* 899 F.2d 243 (3rd Cir. 1990)(knowingly depositing worthless checks into an account and causing subsequent withdrawals to be made).

In cases where the facts had risen to the level of bank fraud, the defendant had made clear and unmistakable misrepresentations to a financial institution. In the present case, Hien did not execute a scheme to defraud Wells Fargo Bank. Indeed, arguably, he executed a scheme to defraud certain parishioners. That is to say, Hien developed an ongoing relationship with the

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parishioners, and when viewed in the light most favorable to the government, he told them that he was using the funds for the VCC and after obtaining funds from them, he deposited the money into his own bank account for his personal use. This is the scheme to defraud the Government attempts to prove; the government has not and indeed cannot prove a scheme to defraud WFB, a federally insured financial institution.[3] The parishioners were the targets of the scheme to defraud. WFB was never a target or victim.

Analyzing solely the relationship between Hien and WFB, there were no material misrepresentations made at the time he presented the checks. He did not make any fraudulent representations to WFB, nor were the transactions against WFB policy or procedure. Hien entered a branch office of WFB and presented valid and negotiable checks to WFB bank tellers. The checks were free of any alterations. WFB accepted the checks and completed the requested transactions in accordance with WFB policies and procedures.

If Hien had presented forged checks to WFB, then his conduct would have fallen within the ambit of § 1344 because he would have made a material misrepresentation to WFB. If Hien had presented false information to obtain a loan from WFB, then his conduct would have fallen within § 1344. However, by depositing valid, unaltered checks, Hien did not make any material misrepresentations to WFB.

Therefore, Hien's conduct does not fall within the bank fraud statute and this Court should enter a judgment of acquittal.

DATED: February 6, 2017 SIDEMAN & BANCROFT LLP

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[3] The legislative intent of § 1344 is to protect federally insured financial institutions, while the states are left with the power to pursue convictions for larceny, embezzlement, and unlawful conversion. This is not the province of this Court.